

**TESTIMONY
SB 369**

**Before the Senate Business, Labor and Economic Affairs Committee
February 8, 2007**

By Ken Sugden, General Manager, Flathead Electric Cooperative

Madam Chair, Members of the Committee, for the record my name is Ken Sugden. I am general manager of Flathead Electric Cooperative headquartered in Kalispell, Montana. Thank you for holding this hearing on Senate Bill 369. Our co-op rises in strong support of this bill.

In anticipation of possible questions you may have about Flathead Electric's need and rationale for this bill, I would like to address specific issues under three general headings. They include the history of our involvement, the significant change that has occurred since the unsolicited amendment was adopted in 2001, and our recent efforts to negotiate with Bresnan Communications.

First, you may be wondering, "Didn't Flathead Electric know at the time it purchased the PacifiCorp property that this property would be subject to the Federal Communications Commission (FCC) pole attachment formulas anyway, regardless of the Legislature's involvement?"

The answer is no. Electric cooperatives are generally not regulated by the FCC on pole attachments. This was specifically reaffirmed in the case of Flathead Electric's acquired PacifiCorp property. In August, 2000, the FCC decided it had no jurisdiction to regulate pole attachment fees of Flathead Electric's subsidiary, Energy Northwest, Inc., which operated the former PacifiCorp property located in Whitefish, Columbia Falls and Kalispell. FCC said it had no jurisdiction because Energy Northwest was cooperatively owned.

Still, you may assert, "But if Flathead Electric agreed to the amendment, why is the co-op now seeking to have it repealed?"

The legislative rationale for this bill has already been touched on. But I want to underscore two major changes that have occurred since 2001. The first change occurred almost immediately. The second change – a monumental one – has occurred in the last couple of years.

As previously noted, shortly after the amendment became law, the cable TV provider at the time asserted that the requirement that our co-op follow the FCC formulas must be applied throughout the co-op's service area, not just to the cable TV attachments within the municipalities we serve. This unanticipated

assertion for across-the-board application had major implications because 75 percent of these attachments are on poles outside these municipalities.

The second change is of even greater significance. As you know, when the 2001 amendment was passed, AT & T, the company bringing the amendment, was only providing one-way cable TV communications with its pole attachments. About two years ago, AT & T's successor, Bresnan Communications, began offering Internet service. Then, in the third quarter of 2006, Bresnan again took a major leap forward in the level of its service by offering digital phone service. This placed the company in direct competition with CenturyTel, the local, incumbent phone company.

What this means for pole attachments is that Bresnan should be subject to the telecommunications rate because they are offering the same service as the telephone company. Bresnan and CenturyTel are putting exactly the same type of equipment on our pole and Bresnan is trying to attract CenturyTel's customers, yet CenturyTel has always paid the telecommunications attachment rate while Bresnan refuses to do so.

Another question you may ask is: Why can't this dispute between two private companies just be settled in court rather than involving the Montana Legislature?

One reason is that the costs for a locally owned, not-for-profit cooperative utility like Flathead Electric to engage in likely expensive litigation against a comparatively large, multi-state corporation headquartered out of state will be borne directly by the Flathead Electric ratepayers, all of whom share in ownership of the co-op. This litigation would have to occur in the federal courts, further adding to costs to ratepayers.

More importantly, as has been stated previously but cannot be overemphasized, this problem was borne out of the anomaly of the 2001 Legislature's adoption of the amendment that Senate Bill 369 seeks to repeal. Rather than incur the high cost and undertaking of protracted litigation, Montanans are best served by legislative action to remove this anomaly from state law.

Does Flathead Electric want to be able to bill companies whatever it wishes for their pole attachments and what evidence can we provide the Legislature that our co-op can be trusted not to gouge companies attaching their cables to Flathead Electric's poles?

Flathead Electric's trustworthiness in this matter is demonstrated in part by the co-op's not having charged telecommunications companies the maximum allowed under the FCC formulas. Other telecommunications companies are paying to the co-op a rate that is about 5 percent lower than the FCC rate. Moreover, with local control, Flathead Electric's consumer-elected trustees realize that many of their ratepayers pay both Bresnan and Flathead Electric

bills. Also, Flathead Electric has indicated to Bresnan a willingness to gradually phase in any ramp up to its higher telecommunications rate.

You also may be wondering why the attachment rates we charge are important to our operations. The answer is that there are definite costs and challenges associated with having these cables attached to the co-op's poles. These challenges include safety, right-of-way and weight load.

When other utilities attach their cables to electric utility poles, there generally is a need for a higher, stronger pole than would be required without the pole attachments. The attaching company pays for these initial upgrades but the co-op bears the cost of any replacement poles needed when they are damaged or wear out. It's also important to note that the attachment of cable TV and telephone cables causes strain on the pole due to the wind and ice loading of the cable between poles. In addition, in order for linemen to climb up to work on the electrical lines at the top of the pole, they must climb around the telephone and cable TV pole attachments. In order to do that they must unhook their strap around the pole and re-hook it above the pole attachments. The addition of pole attachments also requires coordination between the utilities in instances where the pole is damaged by trees, automobiles, etc.

Would SB 369 affect any other companies besides Bresnan on our system?

Not at this time. However, Time-Warner offers video and Internet services in Libby and we understand they are planning to soon begin offering telephone services. Flathead Electric feels they also should pay the telecommunications attachment rate as soon as they begin offering telephone service.

Before I close, I want to address from Flathead's perspective the question of why we are bringing this legislation to you instead of just trying to negotiate an agreement with Bresnan?

Last October, we sent Bresnan a letter requesting they begin paying the telecommunications rate, effective January, 2007. Four days later, we received their response that said they are not a telecommunications company under the FCC rules. In December, after bringing this matter to the attention of some of our area legislators, they asked us to try to work out an agreement with Bresnan.

In January, we did contact Bresnan to see if we could work out a solution. So far, despite numerous efforts on our part, Bresnan still maintains they shouldn't be under the telecommunications rate.

In closing, the question of whether Bresnan should pay the telecommunications rate goes to a basic issue of fairness. From the standpoint of Bresnan's competitors, Senate Bill 369 will allow us to treat all telecommunications companies the same.

In other words, if you look like a duck, walk like a duck and quack like a duck, to be fair, you are a duck and therefore ought to be treated like a duck.

Senate Bill 369 also restores fairness for our own customer-owners. Right now, because of Bresnan's refusal to pay the telecommunications rate, our co-op customers who do not subscribe to Bresnan services are subsidizing Bresnan at a cost of nearly \$100,000 a year.

By passing Senate Bill 369, you will allow Flathead Electric to again have local control of its operations so these kinds of inequities can be worked out locally. Thank you for the opportunity to testify.